No. 85-495

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE PRESBYTERIAN CHURCH (U.S.A.), THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., AND THE CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Of Counsel:
SAMUEL E. ERICSSON
MICHAEL J. WOODRUFF
KIMBERLEE WOOD COLBY
P. O. Box 1492
Merrifield, VA 22116
(703) 560-7314

DOUGLAS LAYCOCK
Counsel of Record
727 E. 26th St.
Austin, TX 78705-5799
(512) 471-3275

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE PRESBYTERIAN CHURCH (U.S.A.), THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., AND THE CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The Presbyterian Church (U.S.A.) is a national, Christian denomination with churches in all fifty states. It has approximately 3,150,000 active members and approximately 11,750 congregations organized into 195 Presbyteries and twenty Synods. The highest governing body of the Church is the General Assembly, composed of approximately six hundred delegates elected by the Presbyteries. The Church has long taught that Christians have a duty

to participate in public affairs, and the General Assembly determines the Church's policy on important issues. The positions taken in this brief implement policies of the General Assembly opposing all forms of discrimination and vigorously supporting religious liberty.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-one Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a Governing Board of 250 members chosen by the member denominations in proportion to their size and support. The Governing Board determines the policies of the organization through debate, amendment and adoption of carefully prepared statements and resolutions brought to it by its subordinate program divisions. Several of these policies affirm the principle of religious liberty, and it is on the basis of these policies that it enters this case.

The Christian Legal Society is a non-profit Christian professional association, founded in 1961, with a present membership of 3,500 judges, attorneys, law professors, and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. The Center has been active in public education issues.

Amici are especially interested in this case, because the petition for certiorari raises issues far broader than those actually raised by the facts of record. This is a simple case of disparate treatment, and it is not necessary to decide broader and more difficult issues of accommodation. The disparate treatment issue at the heart of this case is the first order of consideration and is of critical importance to large numbers of religious employees. Sole consideration of that narrow issue is dispositive of this case.

SUMMARY OF ARGUMENT

The statute and the case law identify three distinct kinds of discrimination under Title VII of the Civil Rights Act of 1964: disparate treatment, disparate impact, and failure to reasonably accommodate religious practice. This case requires the Court to articulate the relationship among these legal theories.

There is no need to reach any issue of accommodation if the employer is guilty of disparate treatment or disparate impact. The duty to accommodate is relevant only to facially neutral rules that are justified by business necessity even though they preclude or penalize an employee's religious observance. In such a case, the employee whose religious observance is penalized must request an exemption from the generally enforceable rule. Only such a request for special treatment triggers the duty to accommodate, and only then is it necessary to determine whether the proposed accommodation is reasonable, whether it would impose undue hardship, or whether the employer must accept the employee's proposed accommodation.

The employer in this case is guilty of disparate treatment. The employer's rule facially discriminates on the basis of religion. Employees are entitled to three days of personal business leave for secular business but not for religious observance. It is no defense that a separate rule authorizes three days of leave for religious observance. In combination, these rules authorize six days of paid leave, but only for employees who use exactly three of those days for religious observance. These rules favor some religions and disfavor others. But regardless of who benefits, the explicitly religious restriction on the use of personal business leave is illegal disparate treatment. Whether and how often employees observe their religion on personal leave days is irrelevant to any legitimate interest of the employer.

ARGUMENT

I. If The Employer Is Guilty of Disparate Treatment, There Is No Need to Reach Any Issue of Accommodation.

This case requires the Court to articulate the relationship among disparate treatment, disparate impact, and accommodation. That relationship is manifest in the structure of the statute, but no case has yet required the Court to state it explicitly.

This Court has decided many disparate treatment and disparate impact cases, and the relationship between those theories is well developed. It is stated in some of the Court's opinions and elaborated in the academic literature. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 328-29, 332-33 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 581-83 (1978) (Marshall, J., concurring in part); Brody, *Congress, the President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 80 B.U.L. Rev. 239, 240-69 (1980); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. Rev. 419 (1982).

But this Court has decided only one accommodation case, *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). That case plainly fit only under accommodation theory, and thus provided no occasion to explore the relationship between accommodation and disparate treatment or disparate impact. A brief review of those better known theories will help clarify their relationship with accommodation theory.

The simplest form of discrimination is disparate treatment. Disparate treatment simply means treating an individual differently because of his race, color, sex,

religion, or national origin. This Court's leading disparate treatment cases include *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) (different pension formulas for men and women); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 328-43 (1977) (refusal to hire blacks); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 275-85 (1976) (different discipline for blacks and whites guilty of same offense against employer); and *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) (refusal to hire black applicant). The defenses to a proven incident of disparate treatment are few and narrow. They include the bona fide occupational qualification defense, § 703(e), 42 U.S.C. § 2000e-2(e) (1982), *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977); and the defense that the disparate treatment is pursuant to a valid affirmative action plan, *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

The other common form of discrimination is disparate impact. A plaintiff makes out a prima facie case of disparate impact by showing that a facially neutral rule or employment practice falls more harshly in fact on a protected group than on other employees. But the range of defenses to a charge of disparate impact is much broader than to a charge of disparate treatment. From the explicit statutory defenses in § 703(h), 42 U.S.C. § 2000e-2(h) (1982), the Court has developed the generalized defense of business necessity: an employer may continue a facially neutral practice with disparate impact if the practice is justified by an important and nondiscriminatory business purpose. This Court's leading disparate impact cases include *Connecticut v. Teal*, 457 U.S. 440 (1982) (promotion test with disparate impact on black employees); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582-87 (1979) (drug testing program alleged to have disparate impact on black and Hispanic employees); *Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977) (height and weight requirement with disparate impact on female applicants); and, of course, *Griggs v.*

Duke Power Co., 401 U.S. 424 (1971) (employment test with disparate impact on black applicants).

Both disparate treatment and disparate impact are based on the original text of the statute. § 703(a), 42 U.S.C. § 2000e-2(a) (1982). Both apply to all five classifications forbidden by the statute: race, color, sex, religion, and national origin. Both had been articulated in this Court's cases before the 1972 amendments to the Act. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (disparate impact); *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) (disparate treatment).

The accommodation theory is based on § 701(j), 42 U.S.C. § 2000e(j) (1982), which was unanimously added by a floor amendment in 1972. 118 Cong. Rec. 705, 731 (1972). The amendment did two things. First, it defined "religion" to include "religious observance and practice." The primary effect of this definition is to insert the phrase "including religious observance and practice" wherever the word "religion" appears in the original statutory text. Second, the amendment required employers to reasonably accommodate religious observance and practice, but only if that could be done without undue hardship.

Plainly the amendment did not repeal the disparate treatment or disparate impact theories or exempt religious discrimination from their application. An employer who refused to hire Catholics or Jews would be guilty of disparate treatment, and no inquiry into accommodation would be required. A merchant who required sales clerks to have a diploma from a Catholic high school would be guilty of disparate impact without business necessity, and no inquiry into accommodation would be required. Moreover, the statutory definition of religion makes disparate treatment and disparate impact theory applicable to discrimination based on religious observance and practice. Thus, an employer who required his employees to refrain from attending church would be guilty of disparate treatment of religious observance, and no inquiry into accommodation would be required. An employer who accommodated Seventh Day Adventist Sabbatarians but refused to accommodate Orthodox Jewish Sabbatarians would be guilty of disparate treatment, and no inquiry into the extent of his duty to accommodate would be required.

The purpose of the accommodation amendment was to reach cases not reached by either disparate treatment or disparate impact theory.[1] The particular case Congress had in mind is plainly stated in the brief legislative history. The amendment was sponsored by Senator Randolph, and he was concerned about Sabbatarians whose employers required work on the Sabbath. 118 Cong. Rec. 705-706 (1972). A rule requiring work on Saturday or Sunday is facially neutral; it does not explicitly discriminate on the basis of religion or religious observance. Such a rule has severe disparate impact on Sabbatarians, but the rule is plainly justified by business necessity for many employers. The airline parts warehouse in *Hardison* could not close on weekends, 432 U.S. at 66, and neither can many manufacturers or merchants.

Thus, Senator Randolph's Sabbatarian constituents had no claim under traditional discrimination theories. The accommodation clause was intended to go further. Employers would not be required to close on any employee's Sabbath, but they would be required to rearrange work schedules to exempt Sabbatarians from work on their Sabbath if that could be done without undue hardship. An employer who reasonably accommodated Sabbatarians would obviously have a defense to a disparate treatment charge brought by a non-Sabbatarian required to work

[1] This Court treated the amendment as clarifying Congressional intent and read its meaning into the unamended statute. *Trans World Airlines v. Hardison*, 432 U.S. 63, 76 n.11 (1977). But lower courts had not consistently recognized the right to accommodation of religious practice prior to the amendment. *Id.* at 75 n.10.

on weekends, but the pre-existing law of disparate treatment and disparate impact was not limited in any other way.

The pattern in this original example of accommodation is quite general—indeed, it is definitional. Accommodation claims arise only if a facially neutral rule that is justified by business necessity has disparate impact on a religious group or religious practice. If the rule is not facially neutral, it is illegal under disparate treatment theory. If the rule is not justified by business necessity, it is illegal under disparate impact theory. Only where neither of those theories applies is it necessary to consider an accommodation claim and decide the difficult issues of reasonableness and undue hardship.

In many cases of religious discrimination, it will be obvious that the rule is facially neutral and that it is justified by business necessity. Thus, a large proportion of religious discrimination claims are also accommodation claims. Perhaps that is why some lawyers and judges immediately begin to talk about accommodation as soon as they see a religious discrimination claim.

But the appropriate sequence of inquiry is first to consider whether the plaintiff has a disparate treatment or disparate impact claim. This sequence is both logical and prudential. Accommodation always involves special treatment of the religious employee. This special treatment is justified by his special needs and the statutory commitment to religious pluralism, but special treatment may be misunderstood or resented by other employees. Moreover, how much accommodation is reasonable and how much would impose undue hardship pose difficult balancing questions for the courts. Compare the majority and dissenting opinions in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *see generally* McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1. There is no need to incur these difficulties if the case can be decided under disparate treatment or disparate impact.

Equally important, the inquiry into accommodation will inevitably be confused if the parties and the Court have not clearly analyzed the nature of the challenged rule. It is nonsense to ask how much an employer should accommodate an employee seeking relief from a facially discriminatory rule. Facially discriminatory rules are forbidden, and employees have no obligation to be "reasonable" in accommodating to them. As this brief shows in part II.D, this kind of confusion is evident in the opinions below.

II. The Employer Is Guilty of Disparate Treatment, Because Its Rule Facially Discriminates on the Basis of Religious Observance.

A. *The Rule Facially Discriminates on the Basis of Religious Observance.*

As the Court of Appeals correctly held, plaintiff challenges a facially discriminatory rule. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 483 (2d Cir. 1985), *cert. granted*, 106 S.Ct. 848 (1976). The collective bargaining agreement explicitly states, in two separate provisions, that personal business leave days may not be used for any religious observance. *Id.* at 479 n.2, ¶ 10 and ¶ 11.b.4. The employer would give plaintiff three more days of paid leave if, and only if, he promised not to use the time for religious observance.

This explicit restriction on religious observance is the central fact in the case. No employer can restrict religious observance in off-duty hours, or condition a benefit such as personal business leave on the recipient's willingness to forego religious observance. All such restrictions violate Title VII. And when the employer is a government agency, such as the school board here, such restrictions violate the free exercise clause unless justified by the most compelling reasons. *See Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

The cost of a day's leave to the employer does not depend on whether the employee attends church on his day of leave. Three days leave costs three days pay for a substitute teacher and three days of substitute teaching for the affected students. These costs are identical whether the employee uses the time off for religious or secular business. Thus, plaintiff is not asking for anything the employer has not already agreed to provide. Plaintiff's requests for personal leave have been denied solely because he intends to engage in religious rather than secular activities. There can be no justification for such a rule. The school simply has no legitimate interest in whether the employee attends church on his days of personal leave.

Another way to understand the discrimination here is to recognize that the employer has one policy for employees with religious business and another for employees with secular business. That is the most obvious form of discrimination. This Court held in its first Title VII opinion that an employer could not have "one hiring policy for women and another for men." *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 544 (1971). In more recent sex discrimination cases, the Court has applied "the simple test" of "treatment that but for his sex would be different." *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983), *quoting City of Los Angeles v. Manhart*, 435 U.S. 702, 711 (1978), *quoting Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971). The policy here fails the parallel simple test under the 1972 definition of religion: but for his religious observance, plaintiff's treatment would be different.

B. *The Discriminatory Restriction on the Use of Personal Business Leave Is Not Saved by the Separate Provision for Religious Leave.*

The employer provides three days of leave for religious observance in addition to the three days of leave for personal business. But this commendable accommodation does not exonerate the employer from liability for its discriminatory restriction on the use of personal business leave. It is well settled that a violation of Title VII cannot be justified by other acts of exemplary compliance, or even by affirmative action on behalf of minorities. *Connecticut v. Teal*, 457 U.S. 440, 452-56 (1982); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978).

In any event, the three days of religious leave do not offset or undo the discriminatory restrictions on the use of personal business leave. The employer's policy remains discriminatory both on its face and in effect. The combined effect of the two rules is that employees are entitled to six days paid leave if and only if they use exactly three of those days for religious observance. A Jewish teacher who wanted three days leave for secular business and three more days at Yom Kippur and Rosh Hashanah would get six days paid leave. The only reason why that teacher would get six days and plaintiff only three is that plaintiff offers religious rather than secular reasons for the three additional days. Plaintiff could also have six days leave if he would forego religious observance on three of them and offer exclusively secular reasons for the leave. Thus, the employer is guilty of disparate treatment of religious observance whether its rules are considered individually or collectively.

C. *The Facially Discriminatory Rule Cannot Be Justified By Its Tendency to Reduce the Average Number of Leave Days Claimed.*

For any individual teacher, the cost of six days leave is the same whatever the mix of secular and religious reasons for leave. But the employer may view its restriction on the religious use of personal leave days as a rationing scheme that reduces the average number of leave days claimed. Some employees, like plaintiff here, will not claim their three days for secular business. Many other employees will not claim their three days for reli-

gious observance, because the entire school calendar has been set up to accommodate the numerically dominant faiths. School never meets on Sunday; it therefore never meets on Easter. There is a long vacation at Christmas. This schedule fully accommodates most Christians. School never meets on Saturday, so most Sabbatarians are also accommodated. Employees whose religious needs are fully accommodated by the school's regular calendar will have no need to use leave days for religious observance.[2]

Thus, dividing the six days of leave into three days of religious leave and three days of secular leave may reduce the total number of leave days claimed. Each employee is entitled to six days of personal leave, but only if he has just the right combination of religious and secular needs. Some employees will be able to claim all six days, but many employees will claim fewer, and costs will be lower on average.

The difficulty with this scheme is manifest. An employer cannot use race, color, sex, religion, or national

[2] Plaintiff's challenge to the employer's explicit restriction on religious observance does not depend on the employer's substantial accommodation of the numerically dominant faiths. But this accommodation of the dominant faiths would be highly relevant to the reasonableness of any request for scheduling accommodations by plaintiff or other adherents of minority faiths. That the religious holidays of minority faiths often fall on workdays is not some coincidence caused by minority deviation from the employer's religiously neutral calendar. Minority requests for accommodation are the inevitable result of the employer's decision to accommodate its calendar to the calendar of the largest faiths. Such accommodation protects the religious liberty of the majority and is convenient for the employer; we tend to take it as the natural order of things and forget that it accommodates religious observance. But accommodation for the majority cannot be ignored in considering accommodation for minorities. With their one shift five days a week and their intermittent vacations, schools are among the most accommodating employers in the economy. They are at the opposite extreme from the employer in *Hardison*, with its 24-hour 365-day operation and shift preferences allocated by a statutorily protected seniority system.

origin as a criterion for rationing scarce resources. It cannot achieve average cost savings by discriminating against protected individuals on a forbidden basis. To offer six days leave only to those who will use exactly three of the days for religious observance is like offering six days leave only to teachers of Puerto Rican descent. Either rule would reduce the number of personal leave days claimed, but either rule would be facially discriminatory, and either rule would violate the core prohibition of § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982). If the employer must reduce the use of personal leave days, it must ration on some basis not forbidden by the statute, *i.e.*, on some basis other than race, color, sex, religion, or national origin. Cost is not a justification for disparate treatment. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 n.26 (1983); *City of Los Angeles v. Manhart*, 435 U.S. 702, 716-17 (1978).

In fact, the rule forbidding religious activities on days of personal business leave produces only trivial savings for the employer. Because the school's calendar accommodates most religious observances, and because the three days of religious leave accommodates most of the rest, few employees would use personal business days for religious observance. All the employer's savings are extracted from a very small group of employees—the handful of religious minorities with four to six holy days that do not fall on the more common holy days already recognized by the school's calendar and who are willing to forego personal leave for secular business. Any decision to extract savings solely from this small and protected group violates the central policy of the Act.

D. *If the Court Grants Relief from the Facially Discriminatory Rule, No Accommodation Issue Remains in the Case.*

The facial defects in the employer's rule are the two provisions forbidding employees to use personal leave for religious observance. 757 F.2d at 479 n.2, ¶ 10 and

¶ 11.b.4. If the Court enjoins enforcement of those provisions and awards back pay lost because of them, plaintiff's claims are fully resolved. It is simply not necessary to decide whether the duty to accommodate requires more than three days of religious leave, or indeed, whether it requires any religious leave at all. Those issues are not in the case.

The judges of the Court of Appeals were confused on this point. The majority correctly noted that the employer's rule is "facially discriminatory," 757 F.2d at 483, and that plaintiff does not seek "preferential" or "privileged" treatment, *id.* at 487. Even so, the majority tried to analyze these facts in terms of accommodation. And immediately after identifying the rule's facial discrimination, the majority commented that the rule provides "some teachers all the leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year." *Id.* at 483. The dissenter mistakenly thought that this observation was the basis of the majority's holding. *Id.* at 488 (Pollack, J., dissenting).

But this observation is irrelevant to the disparate treatment issue. The observation would be relevant to a teacher who wanted eight days of leave for religious observance. Then the question would be whether two more days of religious leave would be a reasonable accommodation or whether it would impose undue hardship. Similarly, the Court of Appeals' observation would be relevant if the employer allowed three days of personal business leave usable for any purpose and allowed no additional days for religious observance. Whether employees who need more time for religious observance are entitled to more leave days than other employees is an accommodation question. But that question is not presented by this case. The only issue is whether the employer can forbid religious use of personal leave days available to all. That is a disparate treatment question,

and the answer is clear. The Court should answer that question first.[3]

III. This Court Can Decide the Disparate Treatment Issue Because Its Resolution Would Support the Judgment Below and Because It Is Fairly Included in Question I of the Petition for Certiorari.

Question I of the petition for certiorari asked whether the Court of Appeals erred in holding that plaintiff established "a *prima facie* case of religious discrimination under Title VII." This question includes within its wording any theory that would make out a *prima facie* case of religious discrimination, including disparate treatment. Thus, the petition fairly raises the disparate treatment issue. *See* Supreme Court Rule 21.1(a).

Even if the petition stated only accommodation issues, disparate treatment and disparate impact are "a logical predicate" to any accommodation issue. (The quotation is from *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984).) Thus, disparate treatment and disparate impact issues are logically included in any ac-

---

[3] An accommodation issue could conceivably arise on remand. The Court of Appeals noted the employer's contention that despite the broad wording of the rule, personal leave days are in fact available only for a very narrow set of purposes. 757 F.2d at 485. If this set of purposes is narrow enough, religious observance may be more like important secular business for which leave is not available than like the narrow set of purposes for which leave is available. If the employer could show those facts, there would be no discrimination in not allowing personal business leave to be used for religious observance.

This defense is not very plausible, but the Court of Appeals allowed the employer a second opportunity to prove it on remand. 757 F.2d at 485. If the employer shows that despite the discrimination on the face of the rule, there is in fact no disparate treatment in the operation of the rule, then the rule could stand as applied and plaintiff's disparate treatment claim would fail. Then and only then would it be necessary to decide plaintiff's accommodation claims.

commodation issue that can be resolved on one of the narrower theories.

Finally, plaintiff would get no more relief on a disparate treatment theory than on an accommodation theory. Thus, the disparate treatment issue comes within the well-settled rule that a judgment may be defended on any ground that will fairly support it. *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984); *Blum v. Bacon*, 457 U.S. 132, 137 n.8 (1982).

For each of these reasons, this Court is not bound to perpetuate the error of imposing accommodation analysis on disparate treatment facts.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals on the ground of disparate treatment rather than accommodation. The employer would still be entitled to rebut the *prima facie* showing of disparate treatment on remand, but only by showing that religious observance is most analogous to important secular business for which personal business leave is unavailable.

Thus, the judgment should be affirmed and remanded but further proceedings should be in accordance with this Court's opinion. For a similar disposition, see *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976).

Respectfully submitted,

Of Counsel:
SAMUEL E. ERICSSON
MICHAEL J. WOODRUFF
KIMBERLEE WOOD COLBY
P. O. Box 1492
Merrifield, VA 22116
(703) 560-7314

DOUGLAS LAYCOCK
Counsel of Record
727 E. 26th St.
Austin, TX 78705-5799
(512) 471-3275

June 27, 1986